To the Honorable Court of Criminal Appeals:

This Court wrote, in its per curiam unpublished opinion:

> There does not seem to be a dispute that the classic "revenge porn" scenario—two people take intimate sexual photographs, and one person decides to post them on the Internet without the consent of the other—could be a viable set of facts to support the prosecution of the person who disseminates the pictures.

To the contrary, this is the central dispute in this case: *May speech, such as the publication of nonconsensual pornography, which falls into no category of historically unprotected speech, be constitutionally restricted based on its content? Please see* Mr. Jones's opening brief at 9–11.

Outside of *Williams-Yulee*, the Supreme Court's First Amendment jurisprudence since 2010's *U.S. v. Stevens* answers that question in the negative.[1]

Speech outside of historically unprotected categories may not be restricted based on its content.

"From 1791 to the present, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations."

[1] *Williams-Yulee* is sui generis; only four Justices signed on to its holding that a content-based restriction may pass strict scrutiny despite regulating only protected speech. Please see below at 16.

U.S. v. Stevens, 559 U.S. 460, 468 (2010) (cleaned up). That is, the First Amendment has never permitted restrictions upon the content of speech outside these areas: There is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Id.*at 472. Here *areas* and *categories* are synonymous; categories of unprotected speech are the limited areas in which speech may be restricted based on its content. "These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules." *U.S. v. Alvarez*, 567 U.S. 709, 718 (2012).

Speech that is "protected" is all speech outside these categories. These unprotected categories of speech are "well-defined and narrowly limited," because the "prevention and punishment of [speech within these historical categories of unprotected speech] have never been thought to raise any Constitutional problem." *Stevens* 559 U.S. at 468-69.

The recognition of a category of unprotected speech is effectively a predetermination that the state has a compelling interest in restricting

speech in such a category. There is no *speech that the state has a compelling interest in restricting* that is not *categorically unprotected speech*.

This is what distinguishes the American concept of "free expression" embodied in the First Amendment from that of other common law nations, such as Canada. In the Canadian Charter of Rights and Freedoms, for example, the very first section begins by explaining the limitations upon those rights and freedoms:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Canadian Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, *being* Schedule B to the Canada Act, 1982, c 1 (U.K.). All the legislature need do, when it wishes to limit Canadians' freedoms, is to convince the courts that its limits are "reasonable" and can be "demonstrably justified." The First Amendment affords no such carte blanche to the state, instead announcing in its opening salvo that it is a limitation upon the government itself: "Congress shall make no law…."

The freedom of expression enjoyed by all Americans through the First Amendment is therefore not a privilege granted to us by the government that the government may suspend if, in the judgment of the

legislature, it has a reason to do so that may be "demonstrably justified" or (in the argot of strict scrutiny) a *compelling interest*. Just because the Texas Legislature identifies a social ill it wishes to redress does not create a compelling governmental interest; the compelling governmental interest must arise from those interests already recognized as compelling by the United States Supreme Court: the historically unprotected categories of speech.

This Court's opinion will wreak havoc on free speech in Texas.

Though this Court may not acknowledge it, what this Court has done by declaring that the State has a compelling interest in restricting certain categories of speech, is to create a new category of unprotected speech.

While this Court's opinion is unpublished and may not be cited as authority, the Texas Legislature will look to this Court's opinion when writing statutes; litigants and lower courts will look to it for guidance on how to treat future overbreadth challenges not only to section 21.16(b) but also to other content-based restrictions on speech; and most importantly, citizens of this State must look to the Court's narrowing construction of section 21.16(b) in attempting to determine whether

their conduct violates the law, which is a daunting task.[2] This is particular relevant in the First Amendment context, where criminal statutes must avoid chilling protected expression.[3]

Under this Court's limiting construction of section 21.16(b), a person can violate the statute only if she is aware that obtaining or sharing the intimate visual material will invade a reasonable privacy interest of the person depicted (opinion at *31). But the determination of whether a given expectation of privacy is reasonable is not one that can be made prior to the decision of a factfinder and/or court as to whether society is prepared to recognize that expectation of privacy.[4] This Court has created a new category of unprotected speech but left the determination of whether conduct will fall within that category to a decision that cannot be made by an ordinary person.

This Court's opinion will be read by the Legislature, litigants, and lower courts to create a broad new category of unprotected speech,

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[2] A law must give an ordinary person notice of what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). All criminal laws must give fair notice of what activity is made criminal. *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989).

[3] *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018).

[4] *Katz v. United States*, 389 U.S. 347 (1967).

disclosure of visual material when the depicted person reasonably expected it would remain private,[5] *Opinion at *18*, a broader new category of unprotected speech, *violations of sexual privacy*,[6] *Opinion* at *17, and a wildly broader category of unprotected speech, *intolerable invasions of substantial privacy interests*,[7] Opinion at *17. None of these categories have ever been recognized by the Supreme Court as categories of historically unprotected speech. The mischief that will result from this broadening of the scope of unprotected speech is far greater than the harm that the Legislature purported to address in section 21.16(b), because section 21.16(b), as construed by this Court, cannot have any limiting effect upon the conduct of Texans since no Texan can appropriately determine whether his conduct falls within the new category carved out by this Court.

Respondent Jordan Jones asks that this Court rehear this matter, ordering additional briefing and oral argument; and would show that

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[5] If someone publishes non-intimate private images, his speech is unprotected.

[6] If someone publishes a written sexual memoir, he violates his partners' sexual privacy.

[7] Any time we say something that is not commonly known about someone, we invade his or her privacy; we cannot know when these invasions are intolerable.

this Court's unpublished opinion of May 26, 2021 failed to hew to United States Supreme Court jurisprudence in three specific regards:

1. Cohen

First, this Court incorrectly treated *Cohen v. California*'s dicta regarding "substantial privacy interests … being invaded in an essentially intolerable manner" as authority for restricting speech based on its effect on its subject.

That treatment is based on a misreading of *Cohen*, and should be rejected. In *Cohen v. California* the United States Supreme Court wrote:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

Cohen v. California, 403 U.S. 15, 21 (1971) (emphasis added). This language from *Cohen* is, first of all, pure dicta. The Court did not hold that government could cut off Mr. Cohen's speech. The ultimate holding in *Cohen* was that a jacket laced with profanity did not justify a content-based restriction on speech, even if persons outside the home had not consented to viewing such profanity. *Cohen*, 403 U.S. at 21.

The *Cohen* Court did not define what "substantial privacy interests" are or what manners may invade them that are not "essentially

intolerable." Even within the opinion, the Court was careful to establish that a "broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."

The question in *Cohen* was very different than that in this case. In *Cohen*, the Court was talking about shutting off discourse "solely to protect others from hearing it." The Court in *Cohen* was not contemplating the effect of speech on its subject; it had expressly recognized the difference between restricting speech to protect the hearer, and restricting speech to protect the subject, in another case the same term. *See Org. for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) ("Among other important distinctions, respondent is not attempting to stop the flow of information into his own household, but to the public.").

This Court in *Thompson*, however, took that *Cohen dicta* referring to "shut[ting] off discourse solely to protect others from hearing it"—that is, to protect the listener's privacy—and referenced it in a case that was about the *subject's* privacy. Fortunately, however, that was pure dicta in *Thompson* as well.

Now this Court has taken that *Cohen* dicta about the hearer's privacy, laundered it through *Thompson*, and made it substantive law about the subject's privacy. *Opinion* at *17.

The United States Supreme Court has never, in the almost fifty years since *Cohen*, applied the "essentially intolerable invasion of privacy" rationale to uphold a restriction on speech. Nor has the United States Supreme Court, in listing categories of unprotected speech, ever included *essentially intolerable invasions of substantial privacy interests* or any combination of those words.

2. Legitimate Sweep

Second, this Court disregarded the Supreme Court's repeated statements of what constitutes the "legitimate sweep" of a content-based restriction on speech.

The question here is whether the legitimate sweep of a content-based restriction is:

- The categorically unprotected speech the statute restricts; or
- Any speech that the state has a compelling interest in restricting.

The Supreme Court has several times clearly stated the categorical rule. That a legislature may not add new categories of unprotected speech to the list was a holding made explicit for the first time in *Stevens*: "Last Term, in *Stevens*, we held that new categories of unprotected speech

may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown*, 564 U.S. at 791.

In *Stevens* the Government argued that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. *Stevens*, 559 U.S., at 470. The Court rejected that "startling and dangerous" proposition. *Id.* "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." *Id.,* at 472. But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs." *Id.,* at 470.

What has the Texas Legislature done here but created a *novel restriction on content*, not *part of a long tradition of proscription*, *revising the judgment of the American people that the benefits of the First Amendment's restrictions on the government outweigh its costs*?

And what has this Court effectively done here, by using ad hoc strict scrutiny to uphold the statute, but apply a simple balancing test weighing the value (which may be de minimis) of speech that invades sexual privacy against its social costs, and then allowed the state to punish that speech because it fails that test? In other words, this Court has deferred to the Legislature that it has a compelling interest because the Legislature has identified a wrong that it believes must have a remedy; but not all wrongs are susceptible to remedies, particularly criminal remedies, within the boundaries of the Constitution. If strict scrutiny stood for no more than the proposition that, if a legislative body and a high court agree that a restriction on some fundamental liberty is very important, that liberty can be abridged, then the United States would be no better than Canada or the United Kingdom when it came to securing individual liberties against encroachment by the government. Thankfully, the Framers of the Constitution devised a better system, the American system, which acts primarily as a limit upon the authority of a legislature to act *even where* the Legislature has a good reason, and *even where* the Legislature acts in the narrowest possible manner.

Why would the Texas Legislature forbid *any* given speech, if the state did not have a compelling interest in doing so? The fact that the Legislature has restricted some speech raises the presumption that the Legislature had a compelling interest. Thence, any means the Texas Legislature chooses will then be subject to this Court's limiting construction, which would save any type of bad drafting by limiting the statute to only those cases that fall within this Court's judgment of what the proper scope of the law *should* be. Respectfully, this is not the process the Constitution requires. If the Legislature drafts an overbroad law, the only just thing to do is to strike the law and send the Legislature back to its drawing board to try again, while permitting citizens accused of crime to remain free of the imprimatur of state charges arising under unconstitutional laws.

In this Court's opinion, it was described as "inexplicable" that the Supreme Court would spend ten pages discussing the statute in *Stevens* after determining that the speech did not fall into a recognized category of historically unprotected speech, if the Court were not applying ad hoc strict scrutiny—"if the issue begins and ends with determining that the regulated speech is not historically unprotected." It is easily explicable.

In Part II of the *Stevens* opinion, from page 468 to page 472, the Court addressed the Government's contention that "the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment." *Id.* at 468. That is, the Government contended that the depictions of animal cruelty formed a hitherto unrecognized category of unprotected speech.

After rejecting that contention, in the "inexplicable" Part III, the Court addressed the argument that *the parties* had made: "As the parties have presented the issue…." *Stevens* at 472. The Government's argument that the Court considered in Part III was that the statute should be limited to "specific types of 'extreme' material," *id.* at 473, and that *so limited* the statute covered only depictions "intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene)," *Id.* at 481. That is, the Government was arguing that the speech, so limited, fell into already recognized categories of historically unprotected speech.

The Court in Part III of *Stevens* was simply addressing the parties' arguments, and the Court in this section concluded that the statute was substantially overbroad *even assuming that the government was correct* that extreme depictions of animal cruelty should be treated as unprotected

speech integral to criminal conduct (because intrinsically related to criminal conduct) or should be treated as obscenity (because analogous to obscenity).

As the Court explained at the end of Section III: "We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty [as the Government suggested § 48 be limited] would be constitutional." That is, the Court did not have to decide whether depictions of extreme animal cruelty fall within the category *speech integral to criminal conduct* or the category *obscenity,* because the statute's sweep is not limited to such depictions. Even assuming that depictions of extreme animal cruelty fall into a recognized category of historically unprotected speech (the Government's proposed legitimate sweep) section 48 was overbroad because it covered a real and substantial amount of other speech.

What the Court *did not do* in those ten pages—because it is not part of the categorical test—was discuss whether the Government had a compelling interest in restricting any of the speech covered by the statute, or whether the statute was narrowly tailored to cover that speech. Because the statute covered substantially more speech than crush videos or other depictions of extreme animal cruelty, the Court

was not called upon to decide whether the Government was correct in placing crush videos or depictions of extreme animal cruelty in the category *integral to criminal conduct* or the category *obscenity*.

Rather than find "inexplicable" the Court's addressing the Government's two arguments—first (in Section II) that "'depictions of animal cruelty' should be added to the list" of unprotected categories, *id.* at 469; and second (in Section III) that depictions of *extreme* animal cruelty fall into one or more of the unprotected categories—this Court should—if its ad hoc strict scrutiny theory were correct—wonder why it is that those ten pages of Stevens do not discuss whether the Government has a compelling interest in restricting the speech that it contends it may.

In *Brown*, the Court itself explained what it had done in *Stevens*:

> We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the *depiction of* animal cruelty—though States have long had laws against *committing* it.
>
> The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then

> punishes that category of speech if it fails the test. We emphatically rejected that "startling and dangerous" proposition.

Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 791–92 (2011) (cleaned up). In a footnote, the Court noted that this operation *was strict scrutiny*: "[Justice Alito] suggests that *Stevens* did not apply strict scrutiny. If that is so (and we doubt it), it would make this an *a fortiori* case." *Id.* at 792 fn.1.

In Mr. Jones's case, there is no argument that the nonconsensual pornography forbidden by the statute is either in the category *speech integral to criminal conduct* nor in the category *obscenity*; nor does it fall into any other recognized category of unprotected speech. Because it falls into no such category, nonconsensual pornography is protected speech, which the State may not restrict based on its content.

3. Williams-Yulee and Playboy.

Third, this Court treated *Williams-Yulee*, a plurality opinion of the Supreme Court in special circumstances, as authority contrary to the Court's clear statements in *Stevens* of the law.

Williams-Yulee v. Florida Bar appears to say, as this Court noted at pages 40–41 of its opinion, that a restriction can restrict a real and substantial amount of protected speech, and still pass strict scrutiny. But the portion of *Williams-Yulee* applying strict scrutiny to Canon

7C(1) of the Florida Code of Judicial Conduct—Part II of the lead opinion—was not the voice of the Court, but only of four Justices. Justice Ginsburg did not join in the strict-scrutiny portion of the main opinion (she would have applied lesser scrutiny), and Justices Scalia, Thomas, Kennedy, and Alito dissented.

As Justice Kennedy wrote in dissent, "this Court's opinion contradicts settled First Amendment principles." But *Williams-Yulee* is not an explicit modification or rejection of the rule in *Stevens*, *Alvarez*, and *Brown*. As Justice Scalia wrote in the primary dissent, the Court "purports to reach this destination by applying strict scrutiny, but it would be more accurate to say that it does so by applying the appearance of strict scrutiny."

Williams-Yulee is a special case, a carving-out from the usual First Amendment protection of particular speech that judges view as bringing dishonor on their own kind:

> It is no great mystery what is going on here. The judges of this Court, like the judges of the Supreme Court of Florida who promulgated Canon 7C(1), evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is—but so too are preventing animal torture [as in *United States v. Stevens*], protecting the innocence of children [as in *Brown v Entm't Merchants Ass'n*], and honoring valiant soldiers [as in *United States v. Alvarez*]. The Court did not relax the Constitution's guarantee of freedom of

> speech when legislatures pursued those goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.

Id. at 1682 (Scalia, J., dissenting). Further, there is no indication in the record that a litigant proposed an overbreadth argument in *Williams-Yulee*, making it improper for the Supreme Court to have passed on a theory not raised by the litigants. As such, *Williams-Yulee* is a strict scrutiny case, not an overbreadth case, and any attempt to draw a conclusion about the relation of the two doctrines from its plurality compares apples to the proverbial Florida oranges.

This Court based its decision as well on 2000's *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000). *Playboy*, decided a decade before *Stevens*, held that, absent an "American tradition of forbidding" some speech, a content-based restriction on that speech is "impermissible." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011)

Of note is the compelling interest protected in *Playboy*—keeping pornographic material out of the hands of minors—which does not apply to section 21.16(b). The Court has routinely been more heavy-handed with the censor's pen when protecting minors is at issue, since

the protection of minors is essential to several categories of unprotected speech, such as child pornography and obscenity. In *Brown*, however, when the argument was made that minors needed to be protected from the ills wrought by violent media, the Supreme Court chose to err on the side of protecting expression, holding that the government may not create a new category of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes the category of speech if it fails the test.[8]

Likewise, the Texas Legislature, whatever compelling interest it might think it has, is not entitled to identify a social ill and craft a law against it, relying on this Court to supply a limiting construction that it believes would pass constitutional muster, unless the Legislature can first determine that it had any right to legislate in this arena at all.

And it is on that basis that this Court should reconsider its opinion, particularly in regard to Supreme Court precedent that operates only in highly idiosyncratic areas of First Amendment jurisprudence that did

[8] 564 U.S. at 792.

not announce new rules of broad applicability in the same way that *Stevens* and *Brown* did.

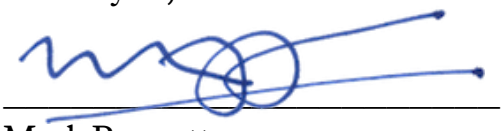
Conclusion

It is true that "the statute's plainly legitimate sweep is the scope in which it may be constitutionally applied," Opinion at *42. The speech to which a content-based restriction on speech may be constitutionally applied, however, is that speech—and only that speech—that is within the Supreme Court's narrow categories of historically unprotected speech. By holding otherwise, this Court has given future Texas Legislatures and future Courts of Criminal Appeals carte blanche to forbid any speech based on no more a colorable argument of compelling state interest.

There may come a day when a less-enlightened Texas Legislature passes a content-based restriction on speech, and a less-enlightened Court of Criminal Appeals has to pass on the unconstitutionality of that restriction. This Court should not leave that legislature and that court with such free rein.

Instead, this Court should rehear this case, allowing oral argument if necessary, and issue a new opinion holding that section 21.16(b) is unconstitutionally overbroad under the First Amendment.

Thank you,



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